

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLOS LOTT,

Defendant-Appellant.

UNPUBLISHED

September 17, 2002

No. 224944

Wayne Circuit Court

LC No. 99-005268

Before: Murphy, P.J., and Hood and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of carjacking, MCL 750.529a, and three counts of armed robbery, MCL 750.529(1). He was sentenced to four concurrent prison terms of fifteen to thirty years each. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied a fair trial because of prosecutorial misconduct. Claims of prosecutorial misconduct are generally reviewed on a case-by-case basis by reviewing the challenged remarks in context to determine whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). However, because defendant did not object to any of the alleged instances of misconduct, we review this issue for plain error affecting defendant's substantial rights, which generally requires a showing of prejudice. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

We agree that the prosecutor made some improper civic duty arguments during her closing argument. *Bahoda*, *supra* at 282; see also *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999). However, the challenged remarks were brief and isolated and any prejudice was alleviated by the court's instruction to the jurors that they must not be influenced by sympathy or prejudice, and that the arguments and statements of the attorneys are not evidence. See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Furthermore, even if it was plainly improper for the prosecutor to ask a witness whether he would tell the jury if he had any doubts about his identification of defendant as one of the perpetrators, see *People v Malone*, 180 Mich App 347, 361; 447 NW2d 157 (1989), defendant was not prejudiced, considering that the witness had already unequivocally identified defendant and that other evidence overwhelmingly pointed to defendant's identity as a perpetrator. *Carines*, *supra*. Accordingly, reversal is not warranted on the basis of these unpreserved errors.

With regard to defendant's remaining claims of misconduct, we conclude that defendant has not established plain error. Defendant has not plainly shown that it was improper for the prosecutor to inquire about his use of aliases, or that the prosecutor inquired about prior arrests for an improper purpose. See *People v Layher*, 464 Mich 756, 758; 631 NW2d 281 (2001); *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997). Regardless, reversal is not required as a timely instruction would have cured any error. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Further, the prosecutor's comments concerning the cellular telephone found in the stolen vehicle were permissible in light of the evidence. *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001). Contrary to what defendant asserts, it is not improper to base an inference upon an inference. See *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Also, it was not improper for the prosecutor to comment on defendant's failure to produce corroborating alibi witnesses, nor did such commentary improperly shift the burden of proof to defendant. *People v Fields*, 450 Mich 94, 112; 538 NW2d 356 (1995). We also find that, given defendant's testimony denying his participation in the charged offense, it was not improper for the prosecutor to recall one of the victims to testify on rebuttal regarding defendant's identity as one of the perpetrators. The testimony was properly responsive to defendant's testimony. See *People v Figures*, 451 Mich 390, 398-401; 547 NW2d 673 (1996). Additionally, the prosecutor did not improperly vouch for the rebuttal witness' credibility, nor did she improperly "sandbag" defendant by an unfair ordering of the proofs. See *People v Vasher*, 449 Mich 494, 504-505; 537 NW2d 168 (1995); see also *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Accordingly, reversal is not warranted on the basis of prosecutorial misconduct.

Next, defendant argues that he is entitled to be resentenced because the trial court failed to justify its substantial departure from the term of imprisonment previously suggested as part of a *Cobbs*¹ evaluation made during plea negotiations, thereby giving rise to a presumption of vindictiveness. We disagree. In *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993) (emphasis added), our Supreme Court approved a procedure whereby a judge may participate in sentence discussions attendant to a plea offer by stating "on the record the length of sentence that, *on the basis of the information then available to the judge*, appears to be appropriate for the charged offense." However, the Court in *Cobbs* never suggested that a preliminary evaluation made pursuant to that procedure would serve to later restrict the court's sentencing discretion should a defendant decline the plea offer. On the contrary, the Court stated:

The judge's preliminary evaluation of the case *does not bind the judge's sentencing discretion*, since additional facts may emerge during later proceedings, in the presentence report, through the allocution afforded to the prosecutor and the victim, or from other sources.

* * *

[T]he judge's final sentencing decision must await receipt of all the necessary information. [*Id.* at 283, 285 (emphasis added).]

¹ *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

Accordingly, we find no merit to defendant's claim that the trial court's sentencing discretion was restricted by the previous *Cobbs* evaluation, such that the court was required to justify the later deviation on the record, or that the deviation gave rise to a presumption of vindictiveness.

Third, defendant argues that his convictions must be reversed because he was never properly arraigned. However, defendant failed to argue below that he did not have proper notice of the charges against him. Therefore, this issue is unpreserved and defendant must establish a plain error affecting his substantial rights. *Carines, supra*. The lower court file does not contain a signed copy of the information. Nonetheless, the record reveals that the charges of which defendant was convicted, as amended at defendant's preliminary examination, were read to defendant on the record at his circuit court arraignment. Given this record, along with the fact that defendant proceeded to trial without ever complaining that he did not have notice of the charges of which he was convicted, we conclude that this unpreserved issue does not warrant appellate relief.

Defendant next claims that reversal is required because the trial court failed to administer the proper oath to the jury. We disagree. At trial, the court administered an oath that substantially comported with the oath required by MCL 768.14, rather than MCR 2.511(G). Because defendant did not object to the oath that was given, this issue is not preserved. Even if the court rule trumps the statute, see *Staff v Johnson*, 242 Mich App 521, 530-531; 619 NW2d 57 (2000); *People v Strong*, 213 Mich App 107, 112; 539 NW2d 736 (1995), we disagree with defendant that giving an oath based on MCL 768.14, rather than MCR 2.511(G), is the kind of error where prejudice is presumed or reversal is automatic. The oath that was given sufficiently served to obtain a promise that jurors would abide by the law, pay attention to the evidence and the credibility of witnesses, and conduct themselves appropriately. See *People v Pribble*, 72 Mich App 219, 225; 249 NW2d 363 (1976). Thus, an error affecting defendant's substantial rights has not been shown. *Carines, supra*.

Defendant next argues that the trial court erred by failing to instruct the jury on the inherent unreliability of witness identification testimony in accordance with the principles set forth in *People v Anderson*, 389 Mich 155, 173; 205 NW2d 461 (1973). Because defendant did not object to the instructions given at trial, or request further instruction by the trial court, this issue is not preserved. See *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). Accordingly, in order to avoid forfeiture of this issue, defendant must establish plain error affecting his substantial rights. *Carines, supra*. The record reveals that the trial court gave CJI2d 7.8. That instruction adequately appraised the jury of the proper considerations for evaluating eyewitness identifications. *People v Carson*, 217 Mich App 801, 807; 553 NW2d 1 (1996), as adopted in relevant part by the special panel in *People v Carson*, 220 Mich App 662, 678; 560 NW2d 657 (1996). Thus, we find no error.

Similarly, defendant has also not demonstrated plain error with the trial court's instruction on reasonable doubt. The court instructed the jury in accordance with CJI2d 3.2,

which sufficiently conveyed the concept of reasonable doubt to the jury. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996); see also *Cooper, supra* at 656.²

Next, defendant argues that entire jury venire was tainted because some of the prospective jurors disclosed their experiences as crime victims. Defendant argues that the trial court should have sua sponte granted a mistrial because of the revelations. We disagree. The questioning of the prospective jurors regarding their experiences as crime victims was necessary to determine whether they could serve fairly and impartially. *People v Bell*, 209 Mich App 273, 278; 530 NW2d 167 (1995). Indeed, defendant himself used the information elicited to reach conclusions regarding juror impartiality, resulting in the dismissal of two jurors for cause and another by peremptory challenge. Because defendant has failed to demonstrate either plain error or that his substantial rights were affected, appellate relief is not available on the basis of this unpreserved issue. *Carines, supra*.

We reject defendant's claim that reversal is required because of the cumulative effect of several minor errors, even if a single error does not warrant reversal. The few errors that did occur did not deprive defendant of a fair trial. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Defendant argues, in pro per, that the trial court erred at sentencing by considering two out-of-state convictions that were obtained without the benefit of counsel or a valid waiver of counsel. Because defendant did not challenge the validity of the convictions at or before sentencing, this issue is unpreserved. See MCR 6.429(C). Accordingly, we review this issue for plain error affecting defendant's substantial rights. *Carines, supra*.

A court may not consider a prior conviction obtained in violation of defendant's right to counsel. *People v Carpentier*, 446 Mich 19, 28-30; 521 NW2d 195 (1994); *People v Alexander*, 234 Mich App 665, 670-671; 599 NW2d 749 (1999). In this case, it is not apparent from the record at sentencing that defendant's two out-of-state convictions were invalid. There is no indication that the convictions were obtained without the benefit of counsel or a proper waiver of counsel. Thus, the record does not establish plain error.

On appeal, defendant has presented copies of responses he received from courts in Minnesota and Mississippi regarding his requests for documents. The response from Minnesota consists of the docket listings for defendant's Minnesota case. It does not expressly indicate that defendant was not represented by counsel when he pleaded guilty to a felony drug offense in that state and the name of a defense attorney is listed at the top of the document. We conclude that this document does not amount to prima facie proof that defendant's Minnesota conviction was invalid. *Carpentier, supra* at 31-32, relying on *People v Moore*, 391 Mich 426, 440-441; 216 NW2d 770 (1974). The response from Mississippi indicates that the requested records were not being provided because defendant failed to demonstrate a specific need for the records or

² In any event, defendant affirmatively expressed satisfaction with the jury instructions as given, which thereby extinguished any instructional errors on appeal. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000).

demonstrate good cause why the records should be provided without the applicable fee. Because the Mississippi court did not refuse to respond to defendant's request and because defendant has not otherwise shown that the Mississippi conviction was obtained without counsel, defendant has not satisfied his burden of establishing that the conviction was invalid or that remand for a *Tucker*³ hearing is required. *Carpentier, supra* at 28, 31-32; *Alexander, supra*.

Defendant also argues that defense counsel was ineffective for not objecting to the court's consideration of the Minnesota and Mississippi convictions. Because defendant did not raise this issue in a motion for a new trial or a *Ginther*⁴ hearing, our review of this issue is limited to mistakes apparent on the existing record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). It is not apparent from the record what efforts, if any, counsel may have made to investigate the out-of-state convictions, or whether he may have inquired of defendant whether he was represented by counsel in those matters. Thus, the record does not permit a conclusion that counsel's performance was deficient. See *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

Defendant further argues, in pro per, that defense counsel was ineffective for failing to object to the prosecutor's questions concerning the use of aliases, defendant's prior arrests, and defendant's failure to present corroborating witnesses. We disagree. As discussed above, defendant has failed to show that the prosecutor's questions on these subjects were improper. Defense counsel is not ineffective in failing to make meritless objections. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Finally, defendant argues, in pro per, that the prosecutor committed misconduct by commenting on the amount of money that defendant was carrying at the time of his arrest. This issue was not preserved with an appropriate objection at trial, thereby limiting our review to plain error affecting defendant's substantial rights. *Carines, supra*. The prosecutor's comments were permissible in light of the evidence as a whole. *Schultz, supra*. There was no plain error.

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Christopher M. Murray

³ *United States v Tucker*, 404 US 443; 92 S Ct 589; 30 L Ed 2d 592 (1972).

⁴ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).